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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/539,570	06/17/2005	Jean-Philippe Pascal	273838US0PCT	4493
22850	7590	05/27/2010		
OBLON, SPIVAK, MCCLELLAND MAIER & NEUSTADT, L.L.P.			EXAMINER	
1940 DUKE STREET			MUKHOPADHYAY, BHASKAR	
ALEXANDRIA, VA 22314			ART UNIT	PAPER NUMBER
			1787	
NOTIFICATION DATE	DELIVERY MODE			
05/27/2010	ELECTRONIC			

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/539,570	PASCAL ET AL.
	<b>Examiner</b> BHASKAR MUKHOPADHYAY	<b>Art Unit</b> 1787

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If no period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### **Status**

1) Responsive to communication(s) filed on 3/10/2010.  
 2a) This action is FINAL.      2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### **Disposition of Claims**

4) Claim(s) 11-20 and 22-25 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 11-20,22-25 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### **Application Papers**

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### **Priority under 35 U.S.C. § 119**

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### **Attachment(s)**

1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO/GS-68)  
 Paper No(s)/Mail Date \_\_\_\_\_

4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date. \_\_\_\_\_  
 5) Notice of Informal Patent Application  
 6) Other: \_\_\_\_\_

## **DETAILED ACTION**

1. Applicants' amendment filed dated 3/10/2010 overcomes the rejections of record, however, the new grounds of rejection as set forth below are necessitated by applicants' amendment and therefore the following action is **final**.

### **Claim Rejections - 35 USC § 103**

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action.

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

- a. Determining the scope and contents of the prior art.
- b. Ascertaining the differences between the prior art and the claims at issue.
- c. Resolving the level of ordinary skill in the pertinent art.
- d. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. Claims 11, 13-17, 20, 22, 23, and 25, rejected under 35 U.S.C. 103(a) as being unpatentable over Bessette (I), (US 2002/0028256) in view of Bessette (II), USPN 6887899, and either NPL "Acarid killer" or Knight, USPN 5439690, taken in view of the evidence given by NPL "Mills J. T" and Misato et al., USPN 4599233.

5. Regarding claims 11, 13 - 17, 20, 22, 23, and 25 Bessette (I) teaches about the composition to control mites (Abstract; [0006]) , in food products affected by mites e.g. cereal ([0006], [0025]), and the composition may be used as "spray powders" with the coated active ingredients in carrier vehicle like inorganic solids , silica etc. ([0027], [0029], e.g, 'silica' [0031], e.g. 'inorganic solids'), with the combination of a solid carriers such as finely divided inorganic solids of having particle sizes less than 50 micron ([0031]). The active ingredient as plant essential oils comprising alpha terpineol, eugenol, cinnamic alcohol, benzyl acetate,2-phenyl ethyl alcohol , benzyl alcohol etc. ([0022], [0023]) may be from 0.05-15% in the composition and carrier may be upto 99% in the composition ([0031]).

Bessette (I), however, does not teach about (a) more than 40 % by weight sodium bicarbonate in the composition and (b) the powder when in direct contact with the acarids induces at least 43% of death of acarids after 10 days.

With respect to difference (a), NPL "Acarid killer" teaches about 95% other ingredients including sodium bicarbonate as carrier with plant essential oils in the composition and act both to kill mites i.e. acarids, and acts as an insecticides too, as

required in claim 17. It is obvious that one of ordinary skill in the art may use sodium bicarbonate more than 40% in the carrier composition and may combine other ingredients to make 95%. It is also obvious that one of ordinary skill in the art may use sodium bicarbonate only as a carrier as claimed in claim 22 with the motivation that it is not toxic and is used as baking soda for human use and thus demands preferred use compared to other carriers of the references.

Since the instant specification is silent to unexpected results, the specific amount of sodium bicarbonate is not considered to confer patentability to the claims. As the combined acaricidal, fungicidal, and insecticidal effects are variables that can be modified, among others, by adjusting the amount of sodium bicarbonate, the precise amount would have been considered a result effective variable by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed amount cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of sodium bicarbonate in the composition to obtain the desired effect (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223).

Alternatively, Knight, teaches about the composition with the carriers and essential oils and other ingredients to combat insects wherein the amount of sodium bicarbonate is 60% ( col 3, lines 65-67 and col 4, lines 1-2). The motivation is sodium

bicarbonate is normally used as baking soda (food) and is well known as fungicidal agent and may deprive mites (acarids) from food by destroying fungi as evidenced by evidence prior arts by Mills J.T. (p332, The full paragraph under "Interactions involving symbiosis between insects and fungi" describes the phenomena and in particular, col 2, in Para 2<sup>nd</sup>, line 5, says ' fungivorous mites').

It is well known, as evidenced by Misato, that sodium bicarbonate is a fungicidal agent (abstract, col.2, lines 25-29, examples).

With respect to difference (b), Bessette (II) teaches about 5% by weight of a plant essential oil mixture which included alpha terpineol, eugenol, cinnamic alcohol, benzyl acetate,2-phenyl ethyl alcohol , benzyl alcohol etc. and, in combination, is effective in killing all exposed house dust mites within 45 minutes of exposure (col 7, lines 30-45). It is obvious that it means 100% exposed mites will be killed. The motivation is plant essential oils may be used as a safe and effective alternative pesticide for control of house dust mites in households and mammals (col 7, lines 47-50). Bessette (II) also teaches about plant essential oils were used which are USFDA approved (col 3, lines 56-60). It is obvious that the oil ingredients are safe to use and not toxic, which means not neurotoxic too as claimed in claim 16.

It would have been obvious to one of ordinary skill in the art at the time of invention to include the teaching of Bessette (II) and NPL "Acarid killer" or Knight into Bessette (I). One of ordinary skill in the art would have been motivated to use sodium bicarbonate as it is well known as fungicidal agent and would deprive mites (acarids) from food by destroying fungi and to use plant essential oils given that they are a safe

and effective alternative pesticide for control of house dust mites in households and mammals (Bessette I, col 7, lines 47-50; and Bessette (II), col 3, lines 56-60 e. g. USFDA approved) in order to induce at least 43% of death of acarids after 10 days

6. Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bessette (I), (US 2002/0028256) in view of Bessette (II), USPN 6887,899, and NPL "Acarid killer" or Knight , USPN 5439690, as applied to claim 11 above, and in further view of Applying Pesticides Correctly (The Ohio State University, 1992).

7. Regarding claim 12, the combination of Bessette (I), (US 2002/0028256) in view of Bessette (II), USPN 6887,899, and NPL "Acarid killer" or Knight speak to the large scale application of sodium bicarbonate as spray powder form to foods including cereals.

The combination is silent as to the application of the sodium bicarbonate to silo walls.

Applying Pesticides Correctly teaches that a wettable powder formulation of a pesticide will leave more pesticide on the surface (p. 72 col. 2). They go on to state that spaces such as silos may be treated (p. 72 col. 2). Additionally, they speak to the covering of surfaces with pesticides (p. 73 col. 2).

Thus, Applying Pesticides Correctly teaches a method for applying pesticides to silo walls, it would have been obvious to one of ordinary skill in the art at the time the

invention was made to have sprayed the composition taught by Bessette (I), in view of Bessette (II), and NPL "Acarid killer" onto surfaces as taught in Applying Pesticides Correctly in order to coat the inside surface of a silo so that the pesticide may come into contact with cereals stored in the silo.

8. Claims 18, 19, and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bessette (I), (US 2002/0028256) in view of Bessette (II), USPN 6887,899, and NPL "Acarid killer" or Knight, USPN 5439690, as applied to claim 11 above, and further in view of "NPL Inorganic compounds --Silica gel", henceforth NPL "silica".

9. Regarding claims 18, 19, and 24, Bessette (I), (US 2002/0028256) in view of Bessette (II), USPN 6887,899, and NPL "Acarid killer" or Knight teach about silica (Bessette (I), [0029], e.g. 'silica) but not silica gel.

NPL "silica" teaches about use of silica, including silica gel, as carrier (p444, line 6<sup>th</sup> line from the bottom and last line of last but one paragraph) may be used in the composition as silica gel (10%W/W) in the termicide composition (p 452, "Termicide" composition). The motivation is silica gel is added as a flow control aid in the formulation (last but third line on page 452).

It would have been obvious to one of ordinary skill in the art at the time of invention to include the teaching of NPL "silica" into Bessette (I), (US 2002/0028256) in view of Bessette (II), USPN 6887,899, and NPL "Acarid killer". One of ordinary skill in

the art would have been motivated to use silica gel in the composition as a flow control aid in the formulation (last but third line on page 452).

### **Response to Argument**

10. Applicants' arguments filed on 3/10/2010 have been fully considered but are moot in view of the new grounds of rejection set forth above.

11. In the new grounds of rejection, Bessette (I), (US 2002/0028256) in view of Bessette (II), USPN 6887,899, and further in view of NPL "Acarid killer" or Knight have been used to meet the amended claimed elements in claim 11. Even if Bessette(I) does not disclose sodium bicarbonate as such, the reference describes in detail about inorganic solid as carrier. In this type of formulation to combat mites, sodium bicarbonate acts as a carrier and the amount meets claim 1 as disclosed by secondary prior art NPL "Acarid killer" of Knight. Bessette (I) discloses that carrier as inorganic solids (Bessette (I), [0030]) may be impregnated with essential oils as active ingredients to make the formulation to be used as spray powders ([0027]) to meet the claimed element "powder" form in claim 11 helps to make spray powders while Bessette (II), as a secondary prior art, teaches using active ingredient "plant essential oil" in amount of 5% kills all the exposed mites within 45 minutes ( Col 7, lines 30-46)

12. NPL "Acarid killer" or Knight et al. have been used as secondary prior arts to meet the dependent claims to meet claimed element "fungicidal" (claim 20). t Knight et al. teach about sodium bicarbonate ad "fungicidal" and even if it is bicarbonate solution as argued by the applicant (page 6, lines 20-22), it is not critical, because Knight is teaching about the property of bicarbonate. Mills remains a relevant reference against the present claims in order to establish how 'symbiotic effect' exhibit the combined benefit of essential oil in combination with bicarbonate carrier, wherein the essential oil combat directly acaricidal effect and bicarbonate acts as fungicide to destroy fungus and thus indirectly destroy "symbiotic effect".

Further, note that while NPL "Acarid killer" or Knight do not disclose all the features of the present claimed invention, NPL "Acarid killer" or Knight is used as teaching reference, and therefore, it is not necessary for this secondary reference to contain all the features of the presently claimed invention, *In re Nievelt*, 482 F.2d 965, 179 USPQ 224, 226 (CCPA 1973), *In re Keller* 624 F.2d 413, 208 USPQ 871, 881 (CCPA 1981). Rather these references teach certain concept, namely Mills teaches "symbiotic effect", Knight teaches about sodium bicarbonate as fungicidal agent and in combination with the primary reference, disclose the presently claimed invention.

### **Conclusion**

13. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

14. A shortened statutory period for reply to this non- final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

15. Any inquiry concerning the communication or earlier communications from the examiner should be directed to Bhaskar Mukhopadhyay whose telephone number is (571)-270-1139.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached on (571)-272- 1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status

information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/B.M. /  
Patent Examiner, Art Unit 1787.

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